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87-601

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

PAUL HEBERLE BRACKEN,

Petitioner

UNITED STATES OF AMERICA,

Respondent.

PETITION TO THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT COMMITTED PLAIN ERROR IN AFFIRMING BRACKEN'S CONVICTION FOR CONSPIRACY TO PROVIDE DRUGS TO FEDERAL PRISON INMATES WHERE THE PRINCIPAL EVIDENCE AGAINST HIM CONSISTED OF TESTIMONY BY TWO CO-CONSPIRATORS.

II.

WHETHER THE APPELLATE COURT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN VIOLATION OF BRACKEN'S RIGHT TO DUE PROCESS UNDER THE LAW BY FAILING TO GIVE A LIMITING INSTRUCTION TO THE EFFECT THAT THE PRIOR INCONSISTENT STATEMENT OF A HOSTILE GOVERNMENT WITNESS COULD ONLY BE CONSIDERED FOR IMPEACHMENT PURPOSES.

III.

WHETHER THE APPELLATE COURT ERRED IN FINDING THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD OTHER THAN THE TESTIMONY OF CO-CONSPIRATORS TO ESTABLISH THE ELEMENTS OF CONSPIRACY AGAINST BRACKEN, LINKING HIM TO THE CRIME CHARGED.

PARTIES TO THE ACTION

Parties to the action are, Petitioner, Paul Heberle Bracken, and Respondent, United States of America.

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CASES

RULES AND STATUTES

NO. _____

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PETITION FOR WRIT OF CERTIORARI

Paul Heberle Bracken, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in case No. 85-2391.

JURISDICTION

Order and Judgment entered on July 13, 1987.

The statutory provision conferring jurisdiction on this Court to review the Judgment and Order in question is 28 U.S.C.A. § 1254 (1).

CONSTITUTION, FEDERAL AND STATE STATUTES

Petitioner was convicted under the following statutory provision.

18 U.S.C.A. § 371 Conspiracy To Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or any agency thereof in

any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

STATEMENT OF CASE

Paul Heberle Bracken was charged by indictment, tried, and convicted by jury in the United States District Court for the Western District of Oklahoma. The Judgment and Commitment Order recites a verdict of Guilty for the offense of violation of Title 18:371, (conspiracy to introduce and provide controlled substances, Marijuana and Heroin, into F.D.I., El Reno, Oklahoma) as charged in the One Count Indictment.

Investigative personnel at the Federal Correctional Institute, El Reno, Oklahoma, were informed by a certain inmate, Johnny Eaton, that one Katrina Lloyd was going to bring drugs to Bracken during a visit to him at the prison. Eaton said he had previously observed Lloyd bringing drugs to Bracken in the visiting area.

Based on this information, Katrina Lloyd was detained when she came to visit, having used a false name on the visitor's roster. A subsequent search of her person uncovered small amounts of both marijuana and heroin. After her detention and apprehension, Ms. Lloyd implicated Bracken and two other individuals to FBI agents.

When called by the Government as a witness in Bracken's trial, Ms. Lloyd testified she had only brought drugs into the prison on one prior occasion and that at both times she was bringing them for Johnny Eaton, not for Bracken. She testified that her purpose in bringing them to Eaton was to settle a debt that Bracken owed to Eaton. Testimony was introduced that Eaton was a traffiker in drugs at the prison and an informant on other inmates.

After Lloyd's testimony to the effect that she was bringing the drugs to Eaton,

the Government recalled an FBI agent to testify as to Lloyd's statements at the time of her arrest at the El Reno. facility. No limiting instruction was given to the jury that the FBI testimony could only be considered for impeachment purposes.

The Tenth Circuit Court of Appeals affirmed the jury's guilty verdict. Except for Eaton's testimony and the FBI testimony of Lloyd's prior inconsistent statement, the only evidence relied on in affirming the conviction was the paraphenalia found in the car in which Lloyd rode to El Reno, and evidence that Bracken was the inmate Lloyd was authorized to visit.

ARGUMENT

The Tenth Circuit Court of Appeals in this case has rendered a decison in conflict with decisions of both the 6th

Circuit and the D.C. Circuit. The latter has established that failure to give limiting instructions on the Court's own initiative will constitute error. United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970); United States v. Lewis, 693 F.2d 189, 197 n.34 (D.C. Cir. 1982).

Furthermore, the Tenth Circuit in this case sanctioned a departure by the trial court from the estabished course of judicial proceedings which requires proof of the elements of the crime charged beyond a reasonable doubt based on direct or circumstantial evidence independent of the testimony of co-conspirators.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Paul Heberle Bracken

BY:

(s) Garland Bloodworth
Garland Bloodworth

Michael A. Taylor

APPENDIX A

Filed July 13, 1987
Clerk, U.S. Court of Appeals
10th Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA	§	
	§	
Plaintiff--Appellee	§	No. 85-2391
	§	D.C.No.
v.	§	CR-85-136-T
	§	Western
PAUL HEBERLE BRACKEN,	§	Dist. Okla.
	§	
Defendant-Appellant.	§	

ORDER AND JUDGMENT

BEFORE McKAY, SETH AND BALDOCK,
Circuit Judges

Defendant Paul Bracken was convicted of conspiracy to provide marijuana and cocaine to inmates at the Federal Correctional Institution, El Reno, Oklahoma, in violation of 18 U.S.C. § 371

(1982). On appeal, defendant challenges his conviction on two grounds: (1) the trial court erred in denying defendant's motion for acquittal because the prosecution failed to establish sufficient evidence permitting a jury to find guilt beyond a reasonable doubt, and (2) the trial court's failure to give a limiting instruction to the jury concerning impeachment testimony was reversible error.

Defendant was incarcerated in El Reno on May 5, 1985 when his girlfriend, Katrina Lloyd, came to visit him. Upon entering the institution and before being permitted to see the defendant, Ms. Lloyd was detained and subjected to a strip search. The officer who ordered the search had received information from another inmate, John Eaton, that Ms. Lloyd would be bringing narcotics to the defendant when she next visited. Record,

vol. 2, at 41. The search revealed that Ms. Lloyd had concealed in her underwear two small round objects enclosed in plastic wrap and wrapped in grey duct tape. Subsequent analysis proved the packages contained marijuana and heroin.

I. Sufficiency of the Evidence

Defendant argues that in a case that rests on circumstantial evidence an appellate court cannot sustain a denial for Motion for Judgment of Acquittal unless "a reasonably minded jury could have concluded the evidence was . . . inconsistent with every reasonable hypothesis of innocence." Appellant's Brief on Appeal, at 9. Following supreme Court precedent, this circuit has rejected that analysis. United States v. Hooks, 780 F.2d 1526, 1529-31 (10th Cir.), crt. denied, 106 S. Ct. 1657 (1986). The appellate court also may not substitute

its belief as to the sufficiency of the evidence. Instead, we must apply the test as set forth in Hooks. "The evidence--both direct and circumstantial, together with the reasonable inferences to be drawn therefrom--is sufficient if, when taken in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." Id. at 1531.

To prove its conspiracy charge, the Government was required to establish beyond a reasonable doubt that defendant and one or more others agreed to commit an unlawful act and that an overt act was committed in furtherance of the conspiracy. United States v. Kendall, 766 F.2d 1426, 1431 (10th Cir. 1985), cert. denied, 106 S. Ct. 848 (1986); United States v. Lopez, 576 F.2d 840, 843 (10th Cir. 1978). Defendant does not challenge

the evidence of the overt act. The Government established, and Ms. Lloyd, an alleged coconspirator, admitted, that she brought drugs into the prison with her when she came to visit the defendant on May 5. Record, vol. 2, at 31, 54-57, 66.

Instead, defendant argues that the evidence is not sufficient to establish an agreement between defendant and Ms. Lloyd to commit an unlawful act. The agreement to participate in an illegal venture, the knowledge of it, and association in it does not have to be established by direct evidence; the agreement "may be inferred from the performance of acts that further its objectives and may be proved by circumstantial evidence." United States v. DeLuca, 630 F.2d 294, 300 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); see also Ianneli v. United States, 420 U.S. 770, 777 n. 10 (1975); Kendall, 766 F.2d at 1431; United States v. Abushi,

682 F.2d 1289, 1293 (9th Cir. 1982); United States v. Andrews, 585 F.2d 961, 964 (10th Cir. 1978).

Mr. Eaton, the informant, testified that he had seen Ms. Lloyd pass drugs to the defendant numerous times on her visits to the prison between November and May. Record, vol. 2, at 131. Ms. Lloyd admitted that she brought drugs into the prison on one previous occasion when she visited the defendant, but she had given them to Mr. Eaton. The evidence established, however, that the only prisoner Ms. Lloyd was specifically permitted to visit was the defendant.[1]

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[1] Prison policy prohibits any individual from being on more than one prisoner's visiting list. Record, vol. 2, at 48. Although she might see and speak with Mr. Eaton if he had a visitor at the same time she visited the defendant, Ms. Lloyd was not permitted to call Mr. Eaton to the visiting room.

Therefore, although Ms. Lloyd testified that on the two occasions when she brought drugs into the prison Mr. Eaton was the intended recipient, the jury could have inferred that defendant was the intended recipient on may 5 and the actual recipient on one or more previous occasions. The evidence also showed that the car in which Ms. Lloyd rode to El Reno contained a large amount of paraphernalia similar to that which Ms. Lloyd had previously used to smuggle drugs into the prison, see id. at 74, including balloons, plastic bags and duct tape. Id. at 37-39. Some marijuana was also found in the car. Id. Taking the evidence as a whole, a reasonable jury could infer that defendant had an agreement with Ms. Lloyd to provide drugs to him in prison throughout the period of her visits.

II. Failure to Give a Limiting Instruction

At trial, on direct examination Ms. Lloyd stated that she had brought drugs to the prison on one previous occasion and had given them to John Eaton. She further testified that Mr. Eaton had called her May 3 and told her to bring drugs to him which she did in the packages discovered May 5. Ms. Lloyd said the defendant did not know she was bringing drugs on May 5, and she intended to try to convince the defendant to take the drugs and give them to Mr. Eaton.

After Ms. Lloyd left the stand, the Government recalled FBI agent Bill Brown to impeach Ms. Lloyd's testimony. He testified that after the strip search, Ms. Lloyd told him the defendant had called her to ask if she would bring him marijuana that was to be delivered to his sister's house by Federal Express. Record, vol. 2, at 106. Ms. Lloyd also said she had brought drugs to the

defendant in prison on five previous occasions, each time receiving $200 for her efforts.

Defendant cites United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970), and claims that the trial court's failure to instruct the jury that Ms. Lloyd's prior statement could only be considered for impeachment purposes constitutes reversible error. As defendant did not request a limiting instruction at trial, we may only reverse if the trial court's omission constitutes plain error. United States v. Newman, 733 F.2d 1395, 1402 (10th Cir. 1984). In Lipscomb, the court reversed defendant's conviction because the trial court failed to instruct the jury that testimony impeaching a hostile government witness was to challenge the witness's credibility but was not admissible for the substance of the

statements. As in this case, the defendant had not requested a limiting instruction nor was one given. The court nonetheless found plain error in the trial court's failure to give an instruction "where, as here, the government's case is weak and the statement is extremely damaging." Lipscomb, 425 F.2d at 227. The defendant in Lipscomb was convicted of interstate transportation of a stolen motor vehicle. At trial a government witness testified he had seen defendant in a car of the same make as the stolen car, but denied he had ridden from Alabama to Tennessee with the defendant or that defendant admitted to the witness he had stolen the car. After the Government declared surprise, it called an FBI agent who testified the witness previously stated that he, in fact, had ridden between the two states with defendant in the car and defendant had admitted to the

witness that he stole the car. The court specifically noted that the impeaching testimony established, in large part, the elements that the Government was required to prove; possession and interstate transportation of a stolen motor vehicle. Id.

The Lipscomb court did not establish a per se rule that failure to give an instruction limiting the effect to be given the prior inconsistent statement is plain error; its holding is narrower. Without evidence to support the elements of the crime other than the prior inconsistent statement, failure to instruct the jury that the statement cannot be considered as substantive evidence of the relative facts is plain error. If, however, the Government has provided substantial evidence other than the prior inconsistent statement to

establish the elements of the offense, failure to give a limiting instruction to the jury is not plain error. See United States v. Miller, 664 F.2d 94, 98 (5th Cir. Unit B Dec. 1981), cert. denied 459 U.S. 854 (1982); United States v. Benton, 637 F.2d 1052, 1059 (5th Cir. Unit B. Feb. 1981); United States v. Orrico, 599 F.2d 113, 117-18 (6th Cir. 1979); 4 J. Weinstein & M. Berger, Weinstein's Evidence § 801 (d) (1) (A) [01] at 801-107 (1985). But see United States v. Lewis, 693 F.2d 189, 197 n.34 (D.C. Cir. 1982) (suggesting that failure to give limiting instruction is per se error if the jury could give substantive effect to the prior inconsistent statement).

We have already discussed the evidence the jury was given to consider in addition to Ms. Lloyd's earlier statement. We concluded that such evidence was sufficient to allow the jury to determine

defendant was guilty of conspiracy beyond a reasonable doubt. The weight of the evidence coupled with defendant's failure to request a limiting instruction convinces us that the court's omission of a limiting instruction with respect to the impeachment testimony does not constitute plain error.

AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

APPENDIX B

CERTIFICATE OF MAILING

This is to certify that on the 11th day of September, 1987, pursuant to Rule 28.4 of the Rules of the U.S. Supreme Court, true and correct copies of the above and foregoing instrument were mailed, postage prepaid, to the following:

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